IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 654 of 1988
with
CIVIL APPLICATION NO.12957 of 1999
with
CIVIL APPLICATION NO.5272 OF 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA
and
Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ASHWINKUMAR MANILAL SHAH
Versus
CHHOTABHAI JETHABHAI PATEL

Appearance:
MR YN OZA for Petitioners
MR JITENDRA M PATEL for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA
and
MR.JUSTICE H.K.RATHOD

Date of decision:08/09/2000

C.A.V. JUDGEMENT

Per D.C.Srivastava, J.

The above-mentioned First Appeal and the two civil applications are proposed to be disposed by a common judgement and order. The First Appeal has been filed against the judgement and decree dated 2.12.1987 of Civil Judge (S.D.), Vadodara, dismissing the suit of the plaintiff-appellant for specific performance of agreement to sell, executed by the defendants nos.1 and 2 on 1.2.1979. The brief facts giving rise to this appeal are as under:-

2 On 1.2.1979 the defendants nos.1 and 2 along with the defendants nos.3 to 8 executed an agreement to sell the land belonging to exclusive ownership, possession and enjoyment of the defendants. The area of the land agreed to be sold was 37,371 sq. ft. of Survey No.17/2, which is wrongly mentioned in the plaint as Survey No.10/2 of village Manjalpura, District Vadodara, at the rate of Rs.5.81 per sq. ft. A sum of Rs.10,001 was paid as earnest money to the defendants. The boundaries of the land to be sold are given in paragraph 1 of the plaint. The defendants nos.1 and 2 at the time of execution of agreement to sell gave assurance that they have right to sell on behalf of the defendants nos.3 to 8 and the title of the said land is clear and marketable. It was the responsibility of the defendants to get non-agricultural permission under the Urban Land (Ceiling & Regulation) Act, 1976 and the expenses thereof were to be borne by the plaintiffs. As such upon the request of both the defendants one Ashok B. Patel, Advocate, was engaged for obtaining requisite permission. The balance amount was to be paid at the time of execution of sale deed and possession was also to be delivered thereafter. Since the property was ancestral property, it was partitioned on 19.9.1979 between the defendants nos.1 to 8. The proceedings for obtaining permission from the Urban Land Ceiling authorities were initiated but thereafter the defendants changed their mind because the prices of the land increased. The defendants nos.1 and 2 by their undated letter informed the plaintiffs that the agreement to sell has come to an end and they can get back the earnest money. Thereafter exchange of correspondence between the parties took place. Neither permission was obtained nor sale deed was executed. Hence, the suit for specific performance of agreement to sell was filed by the plaintiffs.

3 The suit was resisted by the defendants on variety of grounds. The first was that the correct survey number of the land in dispute is 17/2 and not 10/2. Execution of agreement to sell is not disputed. However, it was pleaded that the agreement to sell was not executed by defendants nos.1 and 2 on behalf of defendants nos.3 to 9. The said agreement is null and void because other co-sharers have not joined the same and it has also become null and void because the permission under Land Ceiling Act was not obtained by the plaintiffs. The defendants nos.1 and 2 returned the earnest money of Rs.10,000/- through bank draft by registered post but it was not accepted by the plaintiffs. Consequently, it was pleaded that the plaintiffs had no right to claim back the earnest money.

4 The Trial Court found that the agreement to sell dated 1.2.1979 was not executed by the defendants nos.1 and 2 with the consent of the defendants nos.3 to 9. It further found that the agreement is not a breach of contract and that the agreement to sell because invalid because of rejection of permission by the authorities under the Urban Land Ceiling Act. It was further found by the trial Court that the plaintiffs or any of them are not agriculturists. It further found that the plaintiffs were not ready and willing to perform their part of the contract hence, they are not entitled to decree for specific performance of the contract. As a consequence, it was further held by the trial Court that the plaintiffs are not entitled to get possession of the suit property. With these findings, the suit was dismissed. Hence this appeal.

5 The appeal was filed in the year 1988 whereas Civil Application No.5272 of 2000 was filed by the appellant in the year 2000 for permission to file additional evidence in this appeal under Order 41 Rule 27 of the Civil Procedure Code. This application was filed on 23.6.2000. Three documents are proposed to be tendered as additional evidence in the first appeal under Order 41 Rule 27 of CPC. The first is copy of the order passed by the competent authority under Urban Land Ceiling Act dated 21.10.1986. The second is copy of the zoning certificate issued by the competent authority of VUDA dated 25.2.1999 and the third is copy of the award under Section 11 of the Land Acquisition Act in Compensation Case No.14 of 1973 rendered on 19.2.1986.

6 This application has been opposed by the learned counsel for the respondents who has filed counter affidavit opposing the acceptance of the additional

evidence.

7 Civil Application No.12957 of 1999 was moved on 3.11.1999 by the respondents seeking permission to make constructions and develop the suit land.

8 At first it is proposed to dispose of Civil Application No.5272 of 2000 which is an application under Order 41 Rule 27 of CPC moved by the appellant. Needless to say that the First Appeal was filed in the year 1988 whereas this application for additional evidence was filed by the appellant in June 2000. The three documents proposed to be tendered as additional evidence are dated 21.10.1986, 25.2.1999 and 19.2.1986 respectively. Zoning certificate dated 25.2.1999 may not be in the knowledge of the appellant when the appeal was filed but other documents could not escape the notice of the appellants. However, no party can be permitted to tender any additional evidence in appeal under Order 41 Rule 27 of the CPC as of right. Additional evidence in appeal can be accepted only in view of the provisions contained under Order 41 Rule 27 of CPC. It provides that the parties shall not be entitled to adduce additional evidence in appeal except in three cases mentioned under Rule 27 of Order 41 of CPC. The first case is where the Court, from whose decree the appeal is preferred, has refused to admit evidence which ought to have been admitted. This case is not attracted because it is not alleged by the appellants that these three documents were proposed to be tendered before the trial Court but it refused to accept the same. Consequently, clause (a) of Rule 27(1) of Order 41 of CPC does not apply. The second ground is where the party seeking to produce the additional evidence establishes that such evidence was not within his knowledge or could not be produced when the decree was passed by exercise of due diligence. The third ground is that additional documentary evidence or oral evidence can be admitted where such additional evidence is required by the appellate court to enable it to pronounce the judgement. Consequently, decision on this application was postponed and it was thought desirable that this application be disposed of along with appeal so that the entire evidence on record may be considered and it may be decided whether evidence on record is sufficient to enable the Court to pronounce effective judgment. If it is found that the evidence already on record is sufficient to enable the Court to pronounce effective judgement in appeal and the proposed documentary evidence is not going to turn the scale of decision in favour of one or the other party, there is no justification for admitting the additional evidence. The

case of VORA IBRAHIMJI DOSAJI V. VORA IBRAHIM NOORBHAI MAKATI & BROS. reported in AIR 1999 Guj 101 can be referred.

9 The Apex Court in Arjan Singh v. Kartar Singh reported in AIR 1951 SC 193 has observed that Order 41 Rule 27 of CPC gives discretion to the appellate Court but the discretion given to the appellate Court under this provision to receive and admit additional evidence is not an arbitrary one but is a judicial one circumscribed by the limitations specified in that rule. If the additional evidence is allowed to be adduced contrary to the principles governing reception of such evidence , it will be a case of improper exercise of discretion and the additional evidence so brought on record will have to be ignored and the case has to be decided as if such evidence is not existing.

10 In the case of STATE OF U.P. V. MANBODHAN LAL reported in AIR 1957 SC 9012 the Apex Court has laid down that it is well settled that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at the proper stage and to fill in gaps. Of course, the position is different where the appellate Court itself requires certain evidence to be adduced in order to enable it to do justice between the parties.

11 Again in THE MUNICIPAL CORPORATION OF GREATER BOMBAY V. LALA PANCHAM AND OTHERS reported in AIR 1965 SC 1008 the Apex Court held that under Order 41 Rule 27 of CPC the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgement in a case. This provision does not entitle the appellate Court to let him fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing the lacunae in the evidence that the appellate Court is empowered to admit additional evidence and not for removing the lacunae in the case of the parties.

12 From the above and other catena of decisions on Order 41 Rule 27 of CPC it can be said that at the appellate stage additional evidence can be entertained by

the appellate Court if there is some lacunae in evidence on record which requires clarification by additional evidence, may be oral or documentary evidence and such additional evidence is necessary for pronouncing effective judgement by the appellate Court and that it is not the right of, may be of the appellant or of the respondent to tender as of right additional evidence oral as well as documentary in appeal so as to fill in the lacunae in its case. Lacunae in the case of party can not be permitted to be removed by the appellate Court by accepting additional evidence. On the other hand, if there is some lacunae in the evidence already on the record which requires clarification in that event, certainly the appellate Court can accept additional evidence.

13 In view of the above guidelines we have considered the three documents proposed to be tendered as additional evidence and we are of the opinion that those documents are not such which will help this Court in pronouncing effective judgement. On the other hand, other oral and documentary evidence on record which has been referred to us in the course of the arguments in the appeal are sufficient for pronouncing effective judgement in appeal. Consequently, we do not find any merit in this civil application under Order 41 Rule 27 of the Civil Procedure Code which is hereby rejected.

14 We now proceed to examine the judgement of the trial Court rendered in the Civil Suit out of which First Appeal No.654 of 1998 has arisen. We have heard at length Shri Y.N. Oza, Senior Advocate, learned counsel for the appellants, and Shri J.M. Patel, learned counsel for the respondent. Shri Yatin Oza has argued that practically all the findings recorded by the trial Court are in favour of the appellants but the suit has been dismissed only on two grounds: the first is that no permission u/s 63 of the Bombay Tenancy and Agricultural Lands Act, 1948 was obtained and secondly that the land in dispute did not belong to defendants nos.1 and 2 rather the defendants nos.1 to 9 had share in the said land and it was an ancestral property. He further contended that no permission of urban land ceiling authorities is now necessary and it was incorrect that the permission was refused by the urban land ceiling authorities. He further contended that the finding of the trial Court that the plaintiffs were not ready and willing to perform their part of the obligation under the contract is also incorrect hence, the suit could not have been dismissed on this ground.

15 In our considered opinion, there are various grounds on which the suit of the plaintiffs-appellants for specific performance of the agrement to sell could not have been decreed.

16 The first ground is noncompliance of essential conditions of Section 16(c) of the Specific Relief Act. It provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than terms the performance of which has been prevented or waived by the defendant. From this provision it is clear that a person who fails to aver and prove that he has performed or has always been ready and willing and is still ready and willing to perform the essential terms of the contract is not entitled to a decree for specific performance of contract. It is essential that the plaintiff has to aver in the plaint that he has performed his part of the obligations under the contract or has always been ready and willing to perform his part of the contract. Readiness and willingness both have to be averred as well as proved by the plaintiff seeking a decree for specific performance. Even if there is averment about the plaintiffs' readiness to perform his part of the obligations under the contract but, there is omission or failure to allege in the plaint willingness of the plaintiff to perform his part of the obligation under the contract, the suit for specific performance is bound to be dismissed. The law requires that there should be allegation in the plaint regarding readiness and willingness of the plaintiff to perform his part of the obligation under the contract and this readiness and willingness should have always been shown by the plaintiff. In addition to such allegation there should be specific allegation and there should be specific proof by the plaintiff that he has been ready and willing to perform his part of the obligation under the contract. Again if in evidence mere readiness of the plaintiff is established but not willingness the suit for a specific performance is bound to fail. Similarly, if the willingness of the plaintiff to perform his part of the obligation is proved but not readiness, in that case, no decree for specific performance can be granted. In addition to this, explanation (ii) of Section 16 (c) of the Specific Relief Act provides that for the purposes of clause (c) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. In the light of these provisions, we have examined the allegations made

in the plaint whose translated copy is in the compilation Annexure-I. The plaint contains only 7 paragraphs. We have carefully examined this plaint but we are at a loss to find that there is no allegation in the plaint that the plaintiffs have performed their part of the obligation under the contract or that they have always been ready and willing to perform their part of the contract. In the absence of such an averment in the plaint, the suit for a specific performance is liable to be dismissed. The only witness of the plaintiffs Manilal Shah in his deposition cannot cure this fatal defect. It is settled law that in the absence of pleadings on a point no evidence can be permitted to be adduced by a party on a fact which is not pleaded in the plaint. Since the plaintiff's readiness and willingness to perform their part of the obligation under the contract is not alleged in the plaint, no evidence on the point could be accepted by the Court below. Mere casual statement of PW No.1 Manilal is not strict compliance of the provisions of Section 16(c) of the Specific Relief Act.

17 It may also be mentioned that the trial Court while deciding issue no.5 has recorded a finding that the plaintiff had failed to prove their readiness and willingness to perform their part of the contract. Issues nos.2, 3, 5, 6 and 7 were dealt with together by the trial Court. The said finding of the trial Court does not suffer from any misappreciation of the evidence on record. Shri Oza, learned counsel for the appellants has however drawn our attention to pages nos.145, 146, 147 and 149 of the compilation and argued that the plaintiff's willingness and readiness to perform their part of the obligation under the contract is established from these correspondence and othercorrespondence as well. However, a perusal of these letters would show that actually an advocate was appointed by the plaintiffs to seek necessary permission of the Urban Land Ceiling authorities and whenever the said advocate demanded expenses for the purpose, only part payment was made by the plaintiffs and not the entire amount demanded. From the cross-examination of P.W.No.1 Manilal Bapulal Shah it further transpires that the so called readiness and willingness on the part of the plaintiffs to perform their part of the obligation under the contract was not real but it was imaginary. He admitted that he did not meet the advocate Ashokbhai Bhukubhai Patel for obtaining NA permission. He further admitted that he never enquired what work was being done by the advocate. He further admitted that he did not pay Rs.1000/- as mentioned in Exh.105. At one stage he had admitted that

he had not given any amount to the advocate. Likewise he admitted that he had not gone to the office of Ashokbhai Bhikubhai Patel to enquire about the progress in the matter of getting the permission from the Urban Land Ceiling Authority and he had not engaged anybody else for the said purpose. Likewise he admitted that he did not initiate any proceedings for getting the N.A. permission.

18 From these admissions it is further clear that he was not serious nor was ready and willing to perform his part of the obligations under the contract. On this ground alone the suit could have been dismissed and was rightly dismissed by the Trial Court.

19 The second ground on which the suit could be dismissed is to be found under Section 20(b) of the Specific Relief Act. The jurisdiction of the Court to decree the suit for specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Thus, what is provided under Section 20(1) of the Specific Relief Act is that the jurisdiction of a Court to decree the suit for specific performance is discretionary. However, the discretion has to be exercised judicially based on sound and settled judicial principles and it should not be arbitrarily exercised. Sub-section (2) of Section 20 gives certain illustrations in which the Court may properly exercise the discretion not to decree a suit for specific performance. One of the grounds is that where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract though not voidable gives the plaintiff an unfair advantage over the defendant. In the case before us, the contract certainly gave undue advantage to the plaintiffs and this undue advantage was certainly clear inasmuch as there is cogent evidence on record that the land which is subject matter of the agreement to sell was ancestral land in which all the defendants had a share and not that it was sole property of the defendants nos.1 and 2. Consequently, if by such agreement the plaintiffs got a right to get the sale deed executed in respect of shares of the defendants nos.3 to 9 who are not signatories to the agreement to sell, it can safely be said that the plaintiffs had got an undue advantage at least over the defendants nos.3 to 9 and as such the decree for specific performance can be refused on this ground. Likewise,

under subclause (c) of clause (2) of Section 20 of the Specific Relief Act decree for a specific performance can be refused where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance. In the case before us the agreement to sell was executed only by the defendants nos.1 and 2. No doubt, it is mentioned in the agreement that "it shall be binding on us, heirs, guardians and executors" but this recital in the agreement cannot actually bind the defendants nos.3 to 9 who are the sons of the defendants nos.1 and 2. Shri Oza laid much emphasis upon this recital. But, in our opinion, this recital is ornamental and merely by this recital rights and interests of defendants nos.3 to 9 in the ancestral property cannot be taken away. If the defendants nos.3 to 9 have interest in the ancestral property, it would be inequitable to enforce specific performance of such an agreement against their wish more particularly when they are not signatories to the agreement to sell. Thus, on these two grounds the discretion could have been exercised by the trial Court though the trial Court has not mentioned the provisions of Section 20 of the Specific Relief Act in its judgement. However, the judgement can be supported with Section 20 of the Specific Reliefs Act.

20 There is yet another ground on which the agreement in question was handicapped of being a specifically performed and it is to this effect that the disputed property is established to be ancestral property in which all the defendants have share. Since the agreement was executed by the defendants nos.1 and 2 only and the remaining defendants have not signed the same, no decree for specific performance can be passed. Shri Oza however contended that fraud was practised upon the plaintiffs and in the agreement it was clearly mentioned that the property belonged to the defendants nos.1 and 2 only and there was no mention in the agreement that any of the other defendants had any share in the property. This argument falls to the ground for the obvious reason that if these defendants were not having any share or interest in the joint property, there was no necessity to join them as defendants. On the other hand, the fact that all the 9 persons were joined as defendants in the suit itself indicates that the plaintiffs had full knowledge that the property was ancestral property in which all the defendants had share and interest. Besides this, the statement of PW No.1 Manilal Shah clearly shows that he had full knowledge that all the defendants had share in the disputed land. In the examination-in-chief,

he has stated that the defendants nos.3 to 9 have given oral consent and that at the time of execution of agreement to sell these defendants were present. The oral consent of the defendants nos.3 to 9 is an afterthought. If on his own saying these defendants were present at the time of execution of the agreement to sell, there was no reason why their signatures were not taken on the agreement to sell. Consequently, theory of oral consent of the defendants nos.3 to 9 is liable to be rejected. P.W. No.1 Manilal Bapulal Shah further admitted in the examination-in-chief that the suit land is an ancestral land. In face of admission of one of the plaintiffs, it hardly lies in the mouth of the appellants to contend that the suit land is not ancestral land rather it is exclusive property of the defendants nos.1 and 2. He further admitted that a partition deed was required to be executed for the reason that the family of the defendants nos. 1 and 2 shall get more benefits and equal share. Likewise, he has admitted that in all 9 shares were calculated and the property was to be partitioned in 9 shares. In his affidavit dated 24.7.1987 he deposed that by consent of all the owners agreement to sell was executed on which Chhotabhai and Chhaganbhai had put it their signatures. It is true that defendants nos.3 to 9 have not put their signatures on the agrement to sell. This story that the agreement was executed by the defendants nos.1 and 2 with the consent of their sons is nothing but an afterthought. Even in this affidavit he admitted that it is true that this property is an ancestral property of Chhotabhai and Chhaganbhai. The recital in the agreement to sell that the suit property is of the independent ownership of the defendants nos.1 and 2 cannot change the nature of the property. If this is so then, there is no reason to disbelieve the statement of Chhotabhai Jethabhai who has stated that the suit land is ancestral land and all the defendants have their share in the same in which he has 1/9th share. Likewise, there is no reason to disbelieve this witness that the agreement to sell was not executed with the consent of his sons. He stated that the agreement was executed by the two brothers and their sons are not even aware of the same. Likewise, he stated that the deed of partition was also executed and prior to the execution of the partition deed the land was recorded in the revenue records in the name of defendants nos.1 and 2 but after partition the entries were made under different names of co-sharers. The deed of partition (Annexure-N) at page 72 of the compilation also clearly shows that the land in dispute was ancestral land in which all the 9 persons had equal share. The shares have been defined area and price-wise in the deed of partition. It is

further mentioned in the partition deed that previously it was undivided land in the ownership, occupation and possession of the elders of the family, namely, Chhotabhai Jethabhai Patel and Chhaganbhai Jethabhai Patel. If it was not joint property, there was no question for partition. It is not the case where the transaction was not in the knowledge of the plaintiffs. On the other hand the plaintiffs were fully aware about the partition deed and the partition was brought into existence at the suggestion of the advocate appointed by them for obtaining the requisite permission.

21 In this view of the matter, since in the agreement to sell instead of 2/9th share of the defendants nos.1 and 2 the entire property was agreed to be sold, no decree for specific performance could be granted on the basis of such an agreement to sell. THus, on this ground also the suit was liable to be dismissed.

22 So far as permission under ULC Act is concerned, it might have been necessary when the agreement to sell was executed or when the suit was filed. But since now the Urban Land (Ceiling and Regulation) Act, 1976, has been repealed, no such permission is required to be obtained. Hence, detailed discussion on this point is hardly required.

23 The next point for consideration is whether the defendants or any of them in favour of the plaintiffs, who are admittedly non-agriculturists, could sell the land. In addition to the statement of the defendant on the point that the plaintiffs are not agriculturists there is categorical admission by one of the plaintiffs Manilal Shah in the witness box that he is not an agriculturist and none of the plaintiffs is an agriculturist. He has further admitted that he is doing the business of foodgrains and every year he is doing the business of Rs.3 to 4 crores. Thus, Manilal Shah is a businessman and not an agriculturist on his own admission. There is no reason to disbelieve the statement of the defendant that the plaintiffs are not agriculturists.

24 Shri J.M. Patel, learned counsel for the respondents, contended that under Chapter-IV of the Bombay Tenancy and Agricultural Lands Act, 1948, which applies for area of the State of Gujarat, there is a clear provision after amendment introduced by the Gujarat Act NO.30 of 1977 through Section 5(1) (i) under sub-clause (c) of clause (a), that no agreement made by an instrument in writing for the sale, gift or exchange,

lease or mortgage of any land or interest therein shall be valid in favour of a person who is not an agriculturist. On the basis of this, Shri Patel contended that since the plaintiffs are not agriculturists, the agreement to sell the land in their favour has become invalid. Shri Oza, however, contended that the provisions of Section 63 of the Bombay Tenancy and Agricultural Lands Act will not be applicable because there is evidence on record that the area under which the land is situated came under the Town Planning Scheme and in view of the Gujarat Town Planning and Urban Development Act, 1976, read with Gujarat Act No.4 of 1986, such agreement to sell is not rendered invalid. Brief legislative history is required to be noted at this juncture. For appreciating the legislative history it should be remembered that the agreement to sell was executed on 1.2.1979. At that time Gujarat Town Planning and Urban Development Act, 1976, was in force. Section 121 of this Act provided that the provisions of the said Act do not to apply to areas under Town Planning Scheme. For showing that the area fell under the Town Planning Scheme, attempt was made to file as additional evidence the zoning certificate. Reliance was also placed on the recital of the boundary of the land in dispute in the agreement to sell. Mr Oza contended that since in the agreement itself it is mentioned that towards north of the disputed land T.P. Final Plots Nos.52, 53 and 54 of Revenue Survey No.17/1 existed and towards South T.P. Final Plot No.72 of Revenue Survey No.17/3 existed, hence, it can be inferred that Revenue Survey No.17/2 was also included in the Town Planning Scheme, and as such the provisions of the Tenancy Act did not apply to the area which fell under the Town Planning Scheme. However, Section 121 of the Gujarat Town Planning and Urban Development Act, 1976, was deleted by Gujarat Act No.4 of 1986. This Act was published in the Official Gazette on 6.2.1986. It was given retrospective effect inasmuch as Section 1(2) of Gujarat Act No.4 of 1986 provided that it shall be deemed to have come into force on 12th June 1985. Consequently, it is clear that retrospective effect of Act No.4 of 1986 was given with effect from 12.6.1985. It will therefore be deemed that since 12.6.1985 Section 121 of the Principal Act, 1976 is to be deleted for which Section 5 of the Gujarat Act No.4 of 1986 can be referred.

25 The effect of deletion of Section 121 will be that with effect from 12.6.1985 Section 121 will be deleted and if this is so, then at the time when we are deciding the appeal, provisions of Bombay Tenancy and Agricultural Lands Act, 1948, shall apply and in view of

Section 63(3) of Chapter V, agreement to sell by a person in favour of a person who is not an agriculturist shall not be valid. If the agrement is rendered invalid under Section 63 (c) of the Bombay Tenancy and Agricultural Lands Act, 1948, such agreement is incapable of being specifically enforced. If the agreement to sell itself is invalid, no decree for specific performance could be passed by the trial Court. The agreement which is invalid is in its nature determinable. Section 14(1)(c) of the Specific Relief Act provides inter alia that a contract which is in its nature determinable cannot be specifically enforced. For this reason also, the suit for specific performance of agreement to sell could not have been decreed.

25 The zoning certificate dated 25.2.1999 proposed to be tendered as additional evidence has therefore become irrelevant in view of the foregoing discussion. Likewise, in view of the admission of PW No.1 Manilal Babulal Shah , the land acquisition award also becomes irrelevant and simply because in this award compensation was paid to the two defendants, it will not wipe out the admission made by Manilal Babulal Shah, one of the plaintiffs himself. Likewise, copy of the order of the competent authority under the Urban Land (Ceiling & Regulation) Act, 1976, dated 21.10.1986 has now been rendered infructuous for the reasons given in the foregoing portion of the judgement. For these reasons, the application for additional evidence is liable to be rejected.

26 point which should have been argued by Mr Oza regarding the refund of earnest money was not at all argued by him. However, since the suit was entirely dismissed by the trial Court we deem it proper to discuss whether the direction for refund of the earnest money can be passed in this appeal.

28 Section 22(1)(b) of the Specific Relief Act provides that notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may in an appropriate case ask for any other relief to which he may be entitled including the refund of any earnest money or deposit paid or (made by) him, in case his claim for specific performance is refused. Sub-section (2) of Section 22 of the Specific Relief Act further provides that no relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court unless it

has been specifically claimed. These two provisions therefore make it clear that if the plaintiff wants to claim refund of earnest money, he can do so provided it has been specifically claimed by him in the plaint. We have examined the relief clause in the translated copy of the plaint filed in this compilation.

29 Para 7(1) of the plaint relates to decree for specific performance of agreement to sell. Para 7(2) of the plaint contains a prayer for delivery of possession of the suit land to the plaintiffs by the defendants. Para 7(3) of the plaint relates to the cost of the suit claimed by the plaintiffs from the defendants. Para 7(4) reads as under:-

> "Such other and further relief may be granted as may be deemed fit to this Honourable Court."

Para 7(4) of the plaint is therefore not a specific claim in the alternative for refund of earnest money. As pointed out earlier, such relief for refund of earnest money has to be claimed specifically in the plaint and if it is not so claimed, it can be refused by the Court. Such relief should have been claimed in the alternative as is clear from the wordings of Section 22(1)(b) of the Specific Relief Act, 1963. Though this point was not discussed by the trial Court, yet, it seems that the order of the trial Court which is silent about refund of earnest money can be justified with reference to the provisions contained in Section 22(1)(b) and Section 22(2) of the Specific Relief Act.

30 It would also be relevant to mention here the provisions of clause (3) of the Agreement to Sell which reads as under:-

> "(3) The sellers are entitled to forfeit the amount of earnest money paid by the purchasers in case the sale deed for the land as mentioned in the schedule is not executed upon the fault found with the purchasers."

This forfeiture clause in the agreement to sell entitles the sellers to forfeit the earnest money in case the sale deed could not be executed due to the fault of the purchasers. We have already indicated in the foregoing paragraphs of this judgement that the sale deed could not be executed inter alia on one of the grounds, namely, the purchasers being not ready and willing to purchase the property and get the sale deed executed. As such, in view of this forfeiture clause also, no

direction could be passed by the trial Court regarding refund of earnest money.

31 No other point was pressed by Shri Oza. Consequently, we do not find any merit in this appeal which is required to be dismissed.

32 So far as Civil Application No.5272 of 2000 is concerned, for the reasons given above, this application for additional evidence is also liable to be rejected.

33 Now remains Civil Application No.12957 of 1999, moved by the respondents for permission to make constructions and development of the suit land. Since the suit for specific performance was rightly dismissed, the owners of the land have right to use the same in the manner they like; of course in accordance with law applicable on the relevant date. As such, for using the land and for developing the same, no direction from the Court is called for. This Civil Application has therefore become infructuous and is liable to be rejected as infructuous.

34 For the reasons given above, First Appeal No.654 of 1988 is hereby dismissed with no order as to costs. Civil Application No.5272 of 2000 is likewise dismissed with no order as to costs. Civil Application No.12957 of 1999 is dismissed as infructuous with no order as to costs.

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Shri Y.N. Oza, learned counsel for the appellant requests that he proposes to approach the Apex Court and wants to obtain stay order from there. He prays for time for the purpose. As such, for a period of six weeks from today, nine respondents are restrained from transferring the land which was the subject matter of agreement to sell.

08.09.2000 (D C Srivastava J.)

(H H Rathod J.)